

STATE OF NEW YORK

STATE TAX COMMISSION

In the Matter of the Petition

of

G.S.R. SERVICE STATION CORPORATION

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1979
through May 31, 1982.

In the Matter of the Petition

of

JACOB M. GOLDFARB,
OFFICER OF G.S.R. SERVICE STATION CORPORATION :

for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1979 :
through May 31, 1982.

DECISION

In the Matter of the Petition

of :

LEOPOLD SCHIFF,
OFFICER OF G.S.R. SERVICE STATION CORPORATION

for Revision of a Determination or for Refund
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1979
through May 31, 1982.

In the Matter of the Petition

of

NORBERTO RODRIGUEZ,
OFFICER OF G.S.R. SERVICE STATION CORPORATION :

for Revision of a Determination or for Refund :
of Sales and Use Taxes under Articles 28 and 29 :
of the Tax Law for the Period December 1, 1979 :
through May 31, 1982.

Petitioners, G.S.R. Service Station Corporation, 1770 First Avenue, New York, New York 10028; Jacob M. Goldfarb, 4 East 72nd Street, New York, New York 10021; Leopold Schiff, 144-01 68th Drive, Flushing, New York 11367; and Norberto Rodriguez, 63 LaSalle Drive, New Rochelle, New York 10805, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1979 through May 31, 1982 (File Nos. 49114, 49111, 49112 and 49113).

A consolidated hearing was held before James Hoefer, Hearing Officer, at the offices of the State Tax Commission, Two World Trade Center, New York, New York, on September 10, 1986 at 1:15 P.M. and continued to conclusion before the same Hearing Officer at the same location on December 3, 1986 at 10:45 A.M., with additional evidence to be submitted by April 30, 1987. Petitioners appeared by Joseph S. Herbert & Company (Nathan H. Breen, C.P.A.). The Audit Division appeared by John P. Dugan, Esq. (Irwin A. Levy, Esq., of counsel).

ISSUES

I. Whether the Audit Division properly computed petitioner G.S.R. Service Station Corporation's taxable receipts from the sale of gasoline, motor oil, accessories and tires.

11. Whether the Audit Division properly determined the respective purchase and sale values of certain equipment which was acquired by G.S.R. Service Station Corporation in January of 1980 and subsequently transferred in May of 1982.

111. Whether petitioner G.S.R. Service Station Corporation paid sales tax of \$6,400.00 to the seller of the equipment acquired in January of 1980.

IV. Whether petitioner G.S.R. Service Station Corporation paid the proper sales tax on equipment and furniture and fixtures purchased during the audit period.

V. Whether the amount reported on petitioner G.S.R. Service Station Corporation's general ledger for parking receipts included the 14 percent New York City tax levied on receipts from parking services,

FINDINGS OF FACT

1. Petitioner G.S.R. Service Station Corporation (hereinafter "G.S.R.") operated a gasoline service station and car wash at 1770 First Avenue, New York, New York. G.S.R. began business on or about February 1, 1980 and sold the business on May 25, 1982.

2. On February 2, 1983, G.S.R. executed a consent extending the period of limitation for assessment for the period February 1, 1980 through August 31, 1980 to any time on or before December 20, 1983.

3. On September 15, 1983, the Audit Division, as the result of a field examination, issued a Notice of Determination and Demand for Payment of Sales and Use Taxes Due to G.S.R. for the period December 1, 1979 through May 31, 1982. Said notice determined additional tax due of \$47,359.15, plus penalty of \$10,316.50 and interest of \$12,277.57, for a total amount due of \$69,953.22. Also on September 15, 1983, the Audit Division issued notices of determination and demands for payment of sales and use taxes due to Jacob M. Goldfarb, Leopold Schiff and Roberto [sic] Rodriguez, as officers of G.S.R. who were personally liable for a portion of the taxes due from said corporation. The notice issued to each of the aforementioned three officers encompassed the period December 1, 1979 through May 31, 1982 and assessed a tax due of

\$36,781.95, plus penalty of \$7,672.20 and interest of \$7,659.89, for a total amount due of \$52,114.04. The notices issued to Mr. Goldfarb, Mr. Schiff and Mr. Rodriguez each assessed a tax due less than that assessed against G.S.R. since said officers were not held liable for the use tax allegedly due from the corporation.

4. Jacob M. Goldfarb, Leopold Schiff and Norberto Rodriguez were all officers of G.S.R. and each owned stock in said corporation. No argument or evidence was adduced at the hearings held herein with respect to their personal liability for any sales taxes which may be due from G.S.R.

5. During the course of its examination, the Audit Division determined that G.S.R. did not maintain complete and adequate books and records for the period at issue. G.S.R. failed to provide the Audit Division with sales invoices, purchase invoices and contracts detailing the purchase of certain equipment in January of 1980 and the subsequent sale of its business assets in May of 1982. Most corporate checks, invoices and other data were inadvertently discarded when G.S.R. sold its assets.

6. The additional tax due of \$47,359.15 assessed against G.S.R. in the notice dated September 15, 1983 is comprised of the following four major elements:

- (i) additional sales tax of \$27,856.93;
 - (ii) additional use tax of \$9,200.00 on G.S.R.'s acquisition of certain equipment;
 - (iii) additional sales tax of \$8,925.02 on G.S.R.'s sale of its assets;
- and

(iv) additional use tax of \$1,377.20 on **G.S.R.'s** purchase of assets during the audit period.

7. In computing additional sales tax due of \$27,856.93, the Audit Division made the following adjustments:

(i) it disallowed all claimed nontaxable sales since **G.S.R.** failed to submit exemption certificates;

(ii) it determined additional taxable gasoline sales by obtaining third party verification of **G.S.R.'s** purchases of gasoline and applying markups of 12 percent for leaded gasoline and 18 percent for unleaded gasoline to verified purchases;

(iii) it determined additional taxable sales by applying estimated markups of 100 percent, 55 percent and 35 percent to purchases per cash disbursements journal for oil, accessories and tires, respectively; and

(iv) it determined the New York City tax due on receipts from parking services by applying the 14 percent tax rate to parking receipts recorded on the general ledger.

8. Petitioners presented no credible documentary evidence or argument with respect to the tax asserted due for disallowed exempt sales, additional gasoline sales and additional oil, accessories and tire sales. With respect to the New York City tax due on parking receipts, petitioners contend that the amounts recorded on **G.S.R.'s** general ledger for parking receipts included the 14 percent tax. No credible evidence was presented in support of said contention.

9. Pursuant to an agreement dated January 25, 1980, **G.S.R.** purchased from H.P.S. Capitol, Inc. certain equipment for the sum of \$80,000.00. Item 4 of

said agreement provided that "Buyer agrees to pay to Seller sales tax of eight (8%) percent (\$6,400.00) within 90 days, or as required by Law." As proof that G.S.R. paid sales tax of \$6,400.00 to the seller as specified in Item 4 of the agreement dated January 25, 1980, petitioners submitted a photocopy of G.S.R.'s disbursements journal which showed that check number 1054, dated March 18, 1980, was issued to K.R.K. Capitol, Inc. in the sum of \$6,400.00 with the notation "Sales Tax (Mach)". The record herein does not disclose the relationship, if any, between H.P.S. Capitol, Inc. and K.R.K. Capitol, Inc. The Audit Division has no record of having received any notification of the bulk sale between G.S.R. and H.P.S. Capitol, Inc., nor does it have any record that H.P.S. Capitol, Inc. and/or K.R.K. Capitol, Inc. ever collected \$6,400.00 in sales tax from G.S.R. on the bulk sale of the equipment transferred January 25, 1980.

10. On January 25, 1980, petitioner also entered into a sub-lease agreement with K.R.K. Capitol, Inc. for the lease of the gas station and car wash located at 1770 First Avenue, New York, New York. Item 1 on page 3 of the sub-lease agreement provided as follows:

"That in consideration of the Landlord, K.R.K. Capitol, executing this lease, tenant [G.S.R.] agrees to pay to the landlord the sum of \$35,000 in the following manner: by cash or certified check at the time of execution of the lease."

11. Since the auditor was not provided with the details concerning G.S.R.'s acquisition of certain equipment in January of 1980, he determined that the opening balances shown on G.S.R.'s books for equipment (\$80,000.00) and leasehold improvements (\$35,000.00) constituted the taxable purchase price of said equipment and computed a tax due of \$9,200.00 ($\$115,000.00 \times 8\%$).

Petitioners also failed to provide the auditor with any of the details regarding G.S.R.'s sale of its assets in May of 1982 and the auditor therefore computed the tax due on the sale of said assets in the following manner:

Ending balance in equipment account	\$86,481.00	
Less: accumulated depreciation	<u>17,031.00</u>	
Balance		\$69,450.00
Ending balance in furniture and fixtures account	5,404.00	
Less: accumulated depreciation	<u>603.00</u>	
Balance		4,801.00
Ending balance in leasehold improvements account	35,000.00	
Less: amortization of leasehold improvements	<u>1,069.00</u>	
Balance		<u>33,931.00</u>
Total		\$108,182.00
Tax rate		,0825
Tax due		<u>\$ 8,925.02</u>

12. Pursuant to a closing statement dated May 25, 1982, G.S.R. sold its assets to East Side Car Wash, Inc. for the total sum of \$275,000.00. The closing statement contained, inter alia, the following provision:

"The sale included all equipment, furniture and fixtures of the car wash business operated by the Seller together with the leasehold interest at 1770 First Avenue, New York City, as more particularly described in and pursuant to the terms and conditions of the written Agreement between the parties dated April 6, 1982.

TOTAL PURCHASE PRICE - \$275,000.00, allocated as follows:

Fixed Assets - \$ 7,500.00
Leasehold Interest - 267,500.00"

The written agreement dated April 6, 1982 was not submitted in evidence nor did petitioners provide a detailed list of all equipment, furniture and fixtures transferred to East Side Car Wash, Inc. The Audit Division has no record of having received notification of the bulk sale between G.S.R. and East Side Car Wash, Inc.

13. Petitioners maintain that the value of the fixed assets sold to East Side Car Wash, Inc. was the \$7,500.00 as provided for in the closing statement

dated May 25, 1982 and not the \$108,182.00 computed by the Audit Division.

14. During the audit period, G.S.R. purchased fixed assets totalling \$17,215.00. Since the auditor was not provided with sales invoices or any other proof that G.S.R. paid sales tax on the acquisition of said fixed assets, a tax due of \$1,377.20 ($\$17,215.00 \times 8\%$) was assessed on purchases of fixed assets. G.S.R. asserts that since its accountant's worksheets for machinery and equipment and furniture and fixtures contain entries in odd dollar amounts, e.g., \$2,243.36 and \$3,316.36, it leads to the conclusion that such amounts included sales tax.

CONCLUSIONS OF LAW

A. That section 1138(a)(1) of the Tax Law provides that "if a return when filed is incorrect or insufficient, the amount of tax due shall be determined by the tax commission from such information as may be available" and authorizes, where necessary, an estimate of tax due "on the basis of external indices".

B. That section 1135(a) of the Tax Law provides that every person required to collect tax shall keep records of every sale and all amounts paid, charged or due thereon and of the tax payable thereon. Such records shall include a true copy of each sales slip, invoice, receipt or statement.

C. That G.S.R. provided inadequate and incomplete books and records for purposes of verifying taxable sales. Accordingly, the Audit Division's use of third party verification of gasoline purchases and average markups as a basis for determining G.S.R.'s gasoline sales was proper pursuant to section 1138(a) of the Tax Law.

D. That the estimated markups utilized by the Audit Division to compute oil, accessories and tire sales were reasonable under the circumstances. When

a taxpayer's recordkeeping **is** faulty, exactness **is** not required of the examiner's audit (Matter of Meyer v. State Tax Commission, 61 AD2d 223).

E. That the proper value of the equipment purchased by G.S.R. from H.P.S. Capitol, Inc. in January of 1980 was \$80,000.00 and not \$115,000.00 as determined by the Audit Division. The \$35,000.00 recorded by G.S.R. on its books as leasehold improvements was in actuality consideration paid to K.R.K. Capitol, Inc. for entering into the sub-lease agreement dated January 25, 1980 and, as such, constitutes a nontaxable transaction.

F. That petitioners have failed to present sufficient credible evidence to establish that G.S.R. paid sales tax of \$6,400.00 to H.P.S. Capitol, Inc. on its purchase of equipment from said corporation in January of 1980.

G. That, with respect to G.S.R.'s sale of its assets on May 25, 1982, the sales price allocated to the personal property pursuant to the closing statement is subject to review as to fairness and must have a provable basis for such allocation. The Tax Commission has the right and obligation to arrive at a fair sales price of the personal property for sales tax purposes (Hatter of WEBR, Inc. v. State Tax Commission, 58 AD2d 471). Under the circumstances herein, the book value determined by the Audit Division was the proper basis for determining the bulk sales tax (Platter of Faliro Enterprises, Inc., State Tax Commission, June 19, 1986). However, the sales price determined by the Audit Division of \$108,182.00 erroneously included \$33,931.00 for leasehold improvements (see Finding of Fact "11" and Conclusion of Law "E", supra). Accordingly, the taxable sales price **is** reduced to \$74,251.00.

H. That G.S.R. has failed to present any credible evidence to establish that the amounts recorded in its general ledger for parking receipts included

the 14 percent New York City tax levied on parking services. Furthermore, no credible evidence was presented to show that G.S.R. paid sales tax on the \$17,215.00 of fixed assets purchased during the audit period.


I. That petitioners Jacob M. Goldfarb, Leopold Schiff and Norberto Rodriguez were all officers and shareholders of G.S.R. Since no evidence or argument was presented with respect to their personal liability for any sales taxes due from said corporation, each of the aforementioned individuals were properly held personally liable for the sales taxes due from G.S.R.

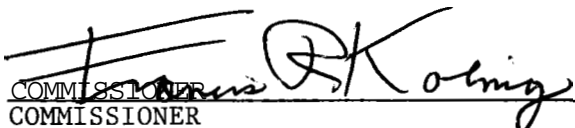
J. That the petition of G.S.R. Service Station Corporation **is** granted to the extent indicated in Conclusions of Law "E" and "G", supra; that the petitions of Jacob M. Goldfarb, Leopold Schiff and Norberto Rodriguez are granted to the extent indicated in Conclusion of Law "G", supra; and that, except as so granted, the petitions are in all other respects denied.

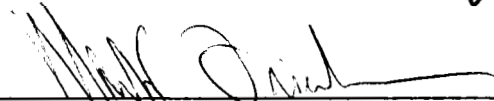
DATED: Albany, New York

STATE TAX COMMISSION

AUG 27 1987


PRESIDENT


COMMISSIONER


COMMISSIONER